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IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 38,549

CHARLES MIZER, R. J. SWEARINGEN, ELMER E. ANDERSON AND HOWARD BARBER, *Appellees*

vs.

KANSAS-BOSTWICK IRRIGATION DISTRICT NO. 2, F. H. GARMAN, WARD DOUGLAS, ALBERT BILLINGS, AND FRED SWOYER, FOR HIMSELF AND OTHER LANDOWNERS SIMILARLY SITUATED AS INTERVENERS, *Appellants*

STATEMENT OF BASIS OF JURISDICTION OF SUPREME COURT OF THE UNITED STATES TO REVIEW ON APPEAL THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF KANSAS

Pursuant to Supreme Court Rule 12, par. 1, Charles Mizer, R. J. Swearingen, Elmer E. Anderson and Howard Barber, the above appellants, file this, their statement particularly disclosing the basis on which said appellant contends that the Supreme Court has appellate jurisdiction to review on appeal the judgment appealed from herein, as follows:

I. The statute believed to sustain appellate jurisdiction is 28 USCA #1257, 62 Stat. 929.

II. The statute of the State of Kansas, the validity of which is involved, is Chapter 304, Laws of Kansas 1951, set forth on pages 472 and 473 of the official Session Laws, 1951, which provides as follows:

"An Act relating to powers and duties of irrigation district boards, amending section 42-721 of the General Statutes of 1949, and repealing said original section.

"BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF KANSAS:

Section 1. Section 42-721 of the General Statutes of 1949 is hereby amended to read as follows: Sec. 42-721. (a) The costs and expenses of purchasing and acquiring property, irrigation works and improvements shall be paid out of funds raised for such purpose or purposes. In case the bonds, or the proceeds from the sale of any series of bonds, are insufficient for the purpose or purposes for which they were issued, additional bonds may be issued after submission of the question to an election in manner provided in this act. (b) Any irrigation district may enter into an agreement with the United States or any department, bureau or agency thereof in pursuance of the federal laws governing such department, bureau or agency, or with any person or corporation for the establishment, construction and completion of the necessary irrigation works as provided in this act, and may in such contract or agreement provide for the payment of the cost of establishing and constructing such works by the levy and collection of assessments against the lands benefited and/or by annual payments from funds raised by the collection of water rentals, tolls or charges from persons furnished water for the irrigation of their lands: PROVIDED, That before any assessments shall be extended on the tax roll against any lands in the district, or the contract providing therefor becomes effective, the board of directors in the district shall file an action in the district court in which the greater part of said district is located, for the approval of any such contract and for the approval of the

proposed assessments. A copy of the proposed schedule of assessments shall be attached to the petition or embodied therein. Service of process shall be deemed sufficient upon the publication of a notice in three issues, a week apart, in some newspaper of general circulation in the district. Said notice shall be addressed "To the landowners of Irrigation District No. — in ——— County, Kansas;" (the number of the district and the name of the county to be filled in) and said notice shall state that a description of the various tracts of land in the District and the respective amounts of assessments proposed for each tract, as fixed by the board, may be examined in the office of the clerk of said district court. It shall not be necessary that the notice contain the description of the various tracts of real estate, or of the total real estate, within the boundaries of the district. Such notice shall specify a date not earlier than thirty days after the date of the first publication of said notice and not later than forty days thereafter within which any qualified owner of land within the district shall file his answer, or other pleadings, to said petition challenging the assessment against his property, if he believes a proposed assessment against his property is either: too high; erroneously computed; or not uniformly assessed in proportion to other tracts within the district. Upon trial of said cause, the court shall hear evidence concerning the correctness and uniformity of assessments and may modify the schedule of assessments in accordance with such evidence. The court hearing such evidence shall review the schedule of assessments as proposed by the board of directors and shall not disturb the findings and assessments of the board unless the proposed assessments are manifestly disproportionate. The assessments as determined by the district court shall be final and a conclusive determination that all such proposed assessments have been made in proportion to the benefits conferred upon such properties by reason of the improvements to be constructed, and such assessments shall constitute a per-

petual lien on the properties so assessed, until paid. The approval of the proposed contract by the trial court, together with any approved changes or modifications of the same, shall be final and binding upon the parties signatory to said contract. For the purpose of defraying the expenses of organizing the district and the maintenance, operation, management, repair and improvement of such irrigation works, including salaries of officers and employees, the board may collect water rentals or service charges, or may levy assessments therefor, or by a combination of methods.

Section 2. Section 42-721 of the General Statutes of 1949 is hereby repealed.

Section 3. This act shall take effect and be in force from and after its publication in the official state paper."

III. The date of the final judgment sought to be reviewed is January 4, 1952, when motion for a rehearing was denied on a judgment rendered on December 8, 1951, and the application for appeal was presented to the Chief Justice of the Supreme Court of the State of Kansas, on March 31, 1952.

IV. This is a suit in equity brought by certain landowners to enjoin an irrigation district and its directors from proceding illegally and under an unconstitutional statute in violation of their vested rights. In addition to a prayer for an injunction, the plaintiffs seek a declaratory judgment under the Kansas Declaratory Judgment Act to determine the validity or invalidity of the Kansas state statute set forth above in paragraph II.

Since the beginning of this lawsuit the issues before the court have involved the question of whether or not the constitutional rights of the plaintiffs have been impaired. The trial court held that the statute involved herein is unconstitutional and repugnant to and in contravention of Article 1, Section 10, of the Constitution of the United States. The Supreme Court of the State of Kansas on appeal reversed

the trial court and held that the Kansas statute in question did not impair the obligation of a contract in violation of Article 1, Section 10, of the Constitution of the United States.

V. Cases believed to sustain the jurisdiction of the Supreme Court of the United States are:

Atlantic Coast Line R. Co. v. *Phillips*, Ga. 1947, 67 S. Ct. 1584, 332 U. S. 168, 91 L. Ed. 1977, 173 A.L.R. 1.

Millsaps College v. *City of Jackson, Miss.*, 1927, 48 S. Ct. 94, 275 U. S. 129, 72 L. Ed. 196.

Chicago, B. & Q. R. Co. v. *Nebraska ex rel. Omaha*, 170 U. S. 57, 18 S. Ct., 513, 42 L. Ed. 948.

Trustees of Dartmouth College v. *Woodward*, 4 Wheat. 518, 4 L. Ed. 629.

VI. The questions involved on this appeal are substantial. From the standpoint of the plaintiffs and the other landowners in the district the issues are important since the defendants are seeking to impose upon them onerous tax burdens which will arise if the proposed irregation program is put into effect. The questions involved are not frivolous, nor are they already settled. There are no federal cases exactly in point which answer the problems presented on this appeal.

It is therefore respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal.

Dated this 31st day of March, 1952.

Respectfully submitted,

EDWARD ROONEY,
JACOB A. DICKINSON,
DAVID PRAGER,
Attorneys for Appellants.

APPENDIX "A"

JULY TERM, 1951

MIZER v. KANSAS BOSTWICK IRRIGATION DISTRICT

No. 38,549

CHARLES MIZER, R. J. SWEARINGEN, ELMER E. ANDERSON and HOWARD BARBER, *Appellees*, v. KANSAS BOSTWICK IRRIGATION DISTRICT No. 2, F. H. GARMAN, WARD DOUGLAS, ALBERT BILLINGS and FRED SWOYER, for Himself and Other Landowners similarly situated as Intervenors, *Appellants*.

Syllabus by The Court

1. Statutes—*Irrigation Contract Between District and U. S. Government— Validity.* In an action to enjoin an irrigation district from carrying out the provisions of a contract with the United States and from proceeding with an action pursuant to such contract and from making assessments thereunder, the record is examined and it is held that chapter 304 of the Session Laws of 1951, which amended G. S. 1949, 42-721, did not impair the obligation of a contract in violation of article 1, section 10, of the constitution of the United States.

2. Same—*Irrigation District—No Vested Right in Continued Existence of Statute.* Where a statute provides for the organization of an irrigation district by a majority of the qualified owners of irrigable land in the proposed irrigation district and further provides that no assessments shall be made against the lands in the district without the contract providing therefor being first submitted to the electors of the district and approved by the majority of them, the signers of the original petition organizing the district do not have a vested right in the provision providing for such submission.

3. Same—*Change of Procedure for Approving Assessments—Validity.* G. S. 1949, 42-721, provided, amongst other things, that no assessments should be made against lands of any person in the district without the proposal or

contract providing therefor being first submitted to the electors of the district and approved by a majority of them. Chapter 304 of the Session Laws of 1951 repealed this proviso and provided in lieu thereof that before any assessments should be extended against any lands in the district an action should be filed in the district court where a greater part of the land in the district is located for the approval of such contract and for the approval of the proposed assessments—*Held* that the act of 1951 did not impair the obligation of a contract in violation of article 1, section 10, of the constitution of the United States.

4. Waters—*Irrigation Districts—Relationship Between Individuals, and State—No Contractual Relationship.* Where a majority of the owners of irrigable land signed a petition for the organization of an irrigation district pursuant to G. S. 1949, 42-701 to 42-730, and the district was later duly organized according to the statutes, the relationship between the signers of the petition for organization and the other landowners in the district on one hand and the state on the other did not constitute a contract within the meaning of article 1, section 10 of the constitution of the United States.

5. Statutes—*Method of Approving Assessments—Nature of Power Conferred.* Chapter 304 of the Laws of 1951 provided that the irrigation district should not levy any assessments until the board of directors of the district should file an action in the district court of the county in which the greater part of the district was located for the approval of the contract and for the approval of the proposed assessments. The act further provided that any qualified owner of land within the district might file an answer or other pleading to the petition challenging the assessment against his property if he believed it too high, erroneously computed or not uniformly assessed in proportion to other tracts within the district; that the court should hear evidence as to the correctness of the assessments and might modify the schedule of the assessments in accordance with such evidence and should not disturb the findings or assessments of the board unless the proposed assessments were manifestly disproportionate—*Held*, this statute did not confer legislative power on the district court.

6. Courts—*Power to Modify Assessments—Evidence—Nature of Power Conferred.* In an action such as that described in the foregoing paragraph of this syllabus, the power of the district court to modify the schedule of assessments attached to the petition is limited by the sentence "The court hearing such evidence shall review the schedule of assessments as proposed by the board of directors and shall not disturb the findings and assessments of the board unless the proposed assessments are manifestly disproportionate" and the court has no power or authority to modify the schedule of assessments except those the evidence shows to be manifestly disproportionate.

7. Waters—*Contract Between District and U. S. Government—Construction.* In an action such as that described in paragraph one of this syllabus, the federal statutes providing for the organization of an irrigation district, the state statutes and the contract entered into between the district and the United States are examined and it is held (*a*) that there is no such conflict between the federal statute and the state statute as to render the state act invalid; (*b*) it is held that the contract is not so uncertain and indefinite in its terms as to prevent its being passed upon or approved by the district court; (*c*) under the terms of the state statute providing for organization of the drainage district G. S. 1949, 42-701 and 42-730, the assessor for the district is bound to make a new assessment every year and the schedule of assessments submitted to the district court with the petition in the action provided for in chapter 304 of the Laws of 1951 is subject to these assessments.

8. Injunction—*Irrigation Districts—Contracts Between District and U. S. Government—Construction and Confirmation.* In an action such as that described in the foregoing paragraphs of this syllabus, the federal statutes providing for the organization of drainage districts provide, amongst other things, "That no contract with an irrigation district under this and the two following sections shall be binding on the United States until the proceedings on the part of the district for the authorization of the execution of the contract with the United States shall have been confirmed by decree of a court of competent jurisdiction, or pending appellate action if ground for appeal be laid."

The action to confirm the proposed contract was brought pursuant to the above section of the federal statutes, as well as chapter 304 of the statutes of 1951. The federal statutes, the contract and the state statute must be construed together. The district court has the power and it is its duty to confirm and approve the contract entered into, unless it appears that the assessments proposed are manifestly disproportionate as to some particular tract of land which has been brought to the attention of the trial court in due time by some landowner filing a pleading in the action to confirm.

Appeal from Republic district court; W. D. Vance, judge. Opinion filed December 8, 1951. Reversed with directions.

Fred Swager, of Belleville, argued the cause and *N. J. Ward*, of Belleville, was with him on the briefs for the appellants.

David Prager, of Topeka, argued the cause and *Edward Rooney* and *Jacob A. Dickinson*, both of Topeka, were with him on the briefs for the appellees.

Paul W. Applegate, of Wakeeney, and *Arno Windscheffel*, of Smith Center, as *amici curiae*.

The opinion of the court was delivered by

Smith, J.: This is an action by taxpayers to enjoin the officers of an irrigation district and the district itself from proceeding pursuant to a contract with the federal government. Judgment was for the plaintiffs. Defendants have appealed.

The petition alleged first the action was brought by four named plaintiffs and certain other persons similarly situated; that one defendant was an incorporated irrigation district and the three named defendants were the elected members of the board of directors of the district.

The petition then alleged that each of the plaintiffs were owners of irrigable land within the district and some of them were signers on the petition for the organization of the district, in accordance with G. S. 1947 Supp., 42-701, *et seq;* that they and many others were induced to sign the petition on representation that under the provisions of

G. S. 1947 Supp., 42-701, before any assessment for improvement should be made against the lands of any person in the district the contract for such improvement should first be submitted to the electors of the district.

The petition then set out G. S. 1949, 42-721. This section provided, amongst other things, for the district entering into a contract with the United States for the construction of irrigation works and that such contract might provide for the payment of the cost of the levy and collection of assessments against the lands benefited. The section contained a proviso as follows:

"Provided no assessment shall be thus made against the lands of any person in district without said proposal or the contract providing therefor being first submitted to the electors of said district and approved by a majority of the electors of said district."

The petition then alleged that plaintiffs and the others in the district in reliance on the statute quoted above contracted with each other and with the state of Kansas in the organization of the district; that the statute was a part of the contract between the parties and the rights of the property owners in the district to vote on any proposal or contract providing for an assessment upon the lands in the district was a valuable vested property right, which was a part of the contract between the property owners and the state at the time the district was organized.

The petition then set out chapter 304 of the Session Laws of 1951. This section amended G. S. 1949, 42-721. This new section is exactly like the old 42-721 except for the proviso. That portion of the new section provides as follows:

"*Provided,* That before any assessments shall be extended on the tax roll against any lands in the district, or the contract providing therefor becomes effective, the board of directors in the district shall file an action in the district court in which the greater part of said district is located, for the approval of any such contract and for the approval of the proposed assessments. A copy of the proposed schedule of assessments shall be attached to the petition or

embodied therein. Service of process shall be deemed sufficient upon the publication of notice in three issues, a week apart, in some newspaper of general circulation in the district. Said notice shall be addressed 'to the land owners of Irrigation District No. —— in — —County, Kansas:' (the number of the district and the name of the county to be filled in) and said notice shall state that a description of the various tracts of land in the district and their respective amounts of assessments proposed for each tract, as fixed by the board, may be examined in the office of the clerk of said district court. It shall not be necessary that the notice contain the description of the various tracts of real estate, or of the total real estate, within the boundaries of the district. Such notice shall specify a date not earlier than thirty days after the date of the first publication of said notice and not later than forty days thereafter within which any qualified owner of land within the district shall file his answer, or other pleadings, to said petition challenging the assessment against his property, if he believes a proposed assessment against his property is either: too high; erroneously computed; or not uniformly assessed in proportion to other tracts within the district. Upon trial of said cause, the court shall hear the evidence concerning the correctness and uniformity of assessments and may modify the schedule of assessments in accordance with such evidence. The court hearing such evidence shall review the schedule of assessments as proposed by the board of directors and shall not disturb the findings and assessments of the board unless the proposed assessments are manifestly disproportionate. The assessments as determined by the district court shall be final and a conclusive determination that all such proposed assessments have been made in proportion to the benefits conferred upon such properties by reason of the improvements to be constructed, and such assessments shall constitute a perpetual lien on the properties so assessed, until paid. The approval of the proposed contract by the trial court, together with any approved changes or modifications of the same, shall be final and binding upon the parties signatory to said contract. For the purpose of defraying the expenses of organizing the district and the maintenance,

operation, management, repair and improvement of such irrigation works, including salaries of officers and employees, the board may collect water rentals or service charges, or may levy assessments therefor, or by a combination of methods."

The petition then alleged that defendant had entered into a contract with the United States and were about to carry it into effect and levy assessments on plaintiffs' land without affording plaintiffs and other landowners in the district a chance to vote on the contract providing for such an assessment; that they had filed an action in the district court of Republic county for the approval of this contract; that plaintiffs had been informed, and believed and therefore alleged the fact to be that a majority of the electors and landowners in the district were opposed to the contract and as a result of the enactment of the new act of 1951 and the acts of the defendants the rights of the landowners in the irrigation district to vote on the assessments had been transgressed, in violation of article 1, section 10, of the constitution of the United States, which prohibited any state from passing any law impairing the obligation of a contract and the defendants were threatening to carry out the provisions of the void statute, in violation of the vested rights of plaintiffs, and in violation of the due process clause of the constitution.

The petition then alleged that in order to legally organize the district it was necessary that a majority of the qualified owners of irrigable land within the district sign the petition; that at the time the district was organized there were 604 persons listed as owners of property in the district and only 265 persons signed the petition, which was not a majority; that the organization of the district was ineffective since a condition precedent to the organization of the district was not complied with.

The petition then alleged that chapter 304, Laws of 1951, was unconstitutional because it vested uncontrollable discretion in the court to approve or disapprove any contract entered into by the board of directors in behalf of the district; that this was an improper delegation of legislative power to a judicial body, in violation of the constitution.

The petition further stated that plaintiffs had no adequate remedy at law and the acts of defendants might result in the creation of a public burden or the levy of any illegal tax; that all the plaintiffs' owned property might be effected by such assessment and their tax burden would be thereby increased.

The petition then alleged that an injunction should be granted enjoining the defendants from proceeding further with the action in the district court of Republic county and from carrying out the provisions of the contract and from levying any assessment on the lands of plaintiffs until they and the other landowners in the district have an opportunity to vote on the proposal.

The petition further stated there was an actual controversy between plaintiffs and defendants and the court should make a declaratory judgment as to the validity of chapter 304 of the Laws of 1951.

The prayer was for an injunction and that chapter 304, Laws of 1951, be held to violate the constitution.

Defendants' demurrer to this petition was overruled. Then they answered. In this answer they admitted the organization of the district; that plaintiffs owned land in the district classified as irrigable and that the legislature of 1951 enacted chapter 304, which amended G. S. 1949, 42-721. The answer then admitted the district had entered into a contract with the United States and shortly thereafter had filed an action in the district court for confirmation of that contract, pursuant to that chapter; that the action was pending on a motion to dismiss because of the filing of the present suit; that the petition was sufficient for the confirmation of the contract and the proceeding should not be dismissed; that on a day stated a demurrer to the petition in this and in the action to confirm were both heard by the court and at the same time the motion to dismiss was heard; the court took both demurrers under advisement and the court directed all parties to have their answers on file; that on June 21, 1951, a hearing was had and the district offered its evidence on the action to confirm, which evidence sup-

ported the petition, and the contract should be confirmed. The answer then contained two paragraphs as follows:

"The defendants concede that there are a number of controversies as between the plaintiffs herein and these defendants, as follows: The plaintiffs contend that House Bill No. 150 confers legislative powers upon the district court, and that such law violates Article 1 of Section 10 of the Constitution of the United States, in that the same impairs the contractual right to vote approval or disapproval of said contract, and which the plaintiffs allege the landowners within the district had under the said section 42-721 before the passage of House Bill No. 150; and the plaintiffs also contend that said House Bill No. 150 violates the due process clause of the 14th amendment of the Constitution of the United States; and that their right to vote upon the contract was a vested right, and which has been taken away by House Bill No. 150; and plaintiffs further contend that said House Bill No. 150 is null and void for the reasons stated.

"These defendants contend that said House Bill No. 150 is not unconstitutional, is not null and void, and does not violate the provisions of the constitution stated, and does not vest legislative powers in the district court, but vests certain judicial powers as set forth in said law."

The answer then contained eleven additional paragraphs setting out legal questions and contentions the parties desired to have adjudicated. We do not find it expedient or necessary to set these out at this point.

At this point Fred Swoyer on behalf of himself and as the representative of some 237 landowners in the district moved for an order permitting him to intervene in the action. He stated that all the persons whom he represented were the owners of real estate in the district and interested in the action. This motion was allowed and the intervenor adopted the allegations of the defendant.

The reply was a general denial.

A motion was filed to strike several of the allegations of the answers. This was overruled. The cause was finally

submitted on a motion of defendants for judgment on the pleadings.

The trial court made some eighteen conclusions of law, not all of which will we find necessary to discuss. Two of them are as follows:

"Said Chapter 304, Laws of 1951, constitutes an unwarranted and unlawful delegation of non-judicial functions and powers to the Court, and as such is in violation of a provision of the constitution of Kansas.

"Said act further impairs the obligations of contract between the owners of irrigable lands and the district, in that under the law as it existed when the district was incorporated, they were granted the right and privilege to pass upon the contract as between said district and the Federal agency and this right was taken away by the provisions of this act."

The final judgment was as follows:

"It is therefore ordered, adjudged and decreed by the court that the foregoing conclusions of law and declaration of rights, orders and decisions upon the controversies herein are the conclusions of law and the declaration of rights, orders and decisions of this court in the above entitled action; and that the defendants and each of them are enjoined and restrained from proceeding further with the said action pending in this court entitled 'In Re: Kansas-Bostwick Irrigation District No. 2, a corporation, No. 10,556'; and that these defendants and each of them are further enjoined and restrained from carrying out the provisions of the contract with the Secretary of Interior, dated the 20th day of April, 1951, a copy of which is attached to the answer of the defendants herein; and these defendants and each of them are further enjoined and restrained from levying any assessments against the lands of these plaintiffs and other landowners within the district to pay for the work contracted for in said contract; and that the defendants pay the cost of this action.

"But that these defendants are not enjoined and restrained from otherwise exercising their powers, duties and functions as provided by law."

It will be noted the trial court adopted the contention of the plaintiff (1) that the provision in the statute at the time the district was organized providing for submission of the contract with the United States, together with the provision for the securing of the signatures at the time the district was organized constituted a contract between the landowners in the district on one hand and the state on the other and the repeal of the provision of the statute providing for submission of the proposal to the electors of the district constituted impairment of a contract in violation of article 1, section 10, of the constitution of the United States; and (2) that the statute amending G. S. 1949, 42,721, conferred legislative powers on the district court. Once we have answered these two contentions, some of the others will not require consideration.

We shall first consider the argument of plaintiffs on Question No. 2. It is based on the clear allegation in their petition that the transaction between the landowners, who signed the petition to organize the district, and the state, which enacted the statute through its legislature, was a contract, which article I, section 10, of the constitution of the United States, prohibits the state from impairing. Stated in other words, they argue that the right which the statute provided at the time they signed the original petition to vote on proposed assessments was a vested right which the state could not impair by subsequent legislation. We find but little to distinguish the oganization proceedings provided in this statute from those providing for the organization of other districts in the state. Our statute books are full of organization proceedings for school districts, drainage districts and other municipal corporations. This statute provides as to irrigation districts organized pursuant to it—

"It shall have all the rights, powers and responsibilities belonging to other public corporations created under and by virtue of the statutes of the State of Kansas." (G. S. 1949, 42-705.)

A distinction between this and most other districts is that apparently because this corporation was entering a rather

new field in Kansas there were additional safeguards thrown around its organization.

In the first place, a majority of the qualified owners of irrigable land within a proposed district must sign a petition directed to the chief engineer of the division of water resources of the state board of agriculture for the organization of the district. "Chief engineer" is a new designation for an old office, the powers of which have been broadened somewhat as the state became irrigation conscious. (See G. S. 1949, 42-701[a].)

This first section contains a sentence as follows:

"Irrigation districts may be formed in order to co-operate with the United States under the Federal Reclamation laws heretofore or hereafter enacted or under any act of congress which shall permit the performance by the United States of work in this state for the purpose of construction of irrigation works." (G. S. 1949, 42-701[a].)

The act provides the requisite number of owners shall be filed for the approval of the creation of the proposed district; that such application shall be accompanied by adequate maps, a general description of the land proposed to be in the district and a statement of the source of water supply of the district, the proposed name, description of the territory proposed to be organized, the name of the owners of irrigable lands in the district, the source from which the lands in the proposed district are expected to be irrigated, the character of the works, water rights, canals, ditches and other property proposed to be constructed, a statement of the need and purpose of the district. (G. S. 1949, 42-701.)

The act then provides that the engineer shall have the power to grant or reject or withhold approval of the application or incorporate in and make a part of his approval such conditions, regulations and restrictions as may be deemed by him advisable or require the submission of additional data and information before he does approve it. (G. S. 1949, 42-702.)

The act then provides for publication of notice of hearing upon the application by the chief engineer.

The act then provides any person interested may file a protest against the approval of the application stating his reasons and that a signer of the petition shall not be permitted to withdraw his name as a signer except for fraud, undue influence or mutual mistake of fact and then only after the chief engineer shall have determined that there was such fraud, undue influence or mutual mistake. It provides that these applications for permission to withdraw must be filed with the chief engineer within thirty days after the first application and that he may hear and determine that application for withdrawal of signatures in advance of hearing for approval upon petition for establishment and organization of the proposed irrigation district.

The act then provides that applicants and objectors shall have the right to appeal to the district court in the county in which the proposed place of diversion of water is situated for a review as to the reasonableness of the division of the chief engineer in granting, withholding, or rejecting approval of the application submitted. These appeals must be taken within thirty days from the date of the order of the chief engineer. (G. S. 1949, 42-703.)

The act then provides that upon determination of the chief engineer that the proposed project is "practical, feasible and economically sound" and applicant is entitled to a permit for the use of water he shall issue applicant a permit providing for the incorporation of the proposed district. Then and not until then may the application be presented to the secretary of state for the granting of articles of incorporation, and the district shall be eligible to incorporate as a quasi municipal corporation." (G. S. 1949, 42-704.)

The act then provides that upon incorporation the district shall have all the rights, powers and responsibilities belonging to other public corporations created in and by virtue of the statutes of the State of Kansas. (G. S. 1949, 42-705.)

The act then provides detailed regulations as to the manner in which the election of three members of the board of directors of the district shall be held. It provides that these directors shall be owners of land within the district and residents of the county in which the district or portion thereof is located and that they shall serve for three years. This

election is under the direction of the chief engineer. (G. S. 1949, 42-706.)

The board is directed first to elect a president, secretary and treasurer and that they shall appoint an assessor of the district and other employees. (G. S. 1949, 42-707, 708.)

The act then provides for selling negotiable evidences of debt for the purpose of defraying the temporary and necessary financial or preliminary expenses. (G. S. 1949, 42-709.)

The act provides that as soon as practicable after the organization the board shall formulate a general plan for its proposed operation powers, as approved by the chief engineer, and it shall state what construction work it is proposed to do and the estimated cost of such construction and shall state whether funds to defray such purchase price of cost of construction shall be raised by issuing bonds or by levying assessments. It provides for carrying on surveys and examinations and that the board shall submit a copy of its maps, plans and estimates to the chief engineer for his approval and upon receiving the approval thereof the board shall determine the amount of money required to be raised. (G. S. 1949, 42-710.)

This section provides as follows:

"All such surveys, examinations, maps, plans and estimates shall be made under the direction of a competent irrigation engineer and certified by him."

The act then confers certain powers upon the board of directors, amongst them are

"The board of directors shall have full power to do any and all things required by the federal statutes now or hereafter enacted, and any and all rules and regulations thereunder in connection with any contract between the United States and the district for the construction, operation and maintenance of any and all necessary works for the storage and distribution of water therein for beneficial use."

And further:

"The board of directors shall have the power to borrow from the United States, its instrumentalities, departments

or agencies, such sums of money as may be necessary for constructing, completing, finishing or operating their works, and to mortgage their corporate property and acquired water rights to secure the payment of any debt contracted by the corporation for the purposes aforesaid and such authority is declared to be an exception to chapter 319 (*), Laws of Kansas, 1933." (G. S. 1949, 42-711.)

The act then provides the district, after it has obtained the approval of the chief engineer of its plans, maps, applications, surveys and examinations and his approval of application for beneficial use of the water, shall have the power to issue bonds of the district for the purpose of purchasing or constructing irrigation works. (G. S. 1949, 42-712.)

The act then provides in a detailed manner for the conduct of the bond election. (G. S. 1949, 42-712.)

The act then contains sections 42-715 and 42-717 of G. S. 1949, which provides as follows:

"The assessor for the district shall as soon as practicable after the first Tuesday of March each year, examine each tract or subdivision of land in said irrigation district and determine the benefits which will accrue to each of such tracts or subdivisions by reason of the construction or acquition of such works; and the amount so apportioned or distributed to each of said tracts or subdivisions as finally equalized or confirmed by the district court, as the case may be, shall be and remain the basis for fixing the annual assessments levied against such tracts or subdivisions in carrying out the purpose of this act. Such assessor shall make or cause to be made, a list of such apportionment or distribution, which shall contain a complete description of each tract or subdivision of lands in said district with the amount and rate per acre for such apportionment or distribution of cost, and the name of the owner or owners thereof; or he may prepare a map of convenient scale showing each of said tracts or subdivisions of land with the rate of apportionment or distribution of costs fixed thereon: *Provided*, That where all lands on any map or section of map are assessed at the same rate, a general statement to that effect will be sufficient with acreage in each tract shown.

Said list or map shall be made in duplicate and one copy shall be filed in the office of the chief engineer and one copy shall be filed in the office of the board of directors of said district, and shall be made available for public inspection. Any assessment of any property in the name of the wrong person shall in no way invalidate the assessment thereof.

"On or before the fifteenth day of May, each year, the assessor must complete his assessment roll and deliver it to the secretary of the board of directors. The board shall thereupon fix a time and place when the board will meet to equalize assessments. The secretary shall give notice of such meeting in some manner as providing for posting and publishing notice of election for approval of resolution directing issuance of bonds. (b) Upon the day specified in the notice the board of directors shall meet as a board of equalization for the purposes of equalizing such assessments and shall continue in session from day to day, so long as may be necessary, but not to exceed ten days, exclusive of Sundays. The board shall hear and determine such objections to the apportionment of benefits and assessments as may come before it; and the board shall make such changes in the apportionment of benefits and assessments as shall appear to be just and equitable. The secretary shall be present during the sessions of the equalization board, and he shall note the changes made in the apportionment of benefits and assessments returned by the assessor and, in the names of persons assessed; and within ten days after the close of the session he shall have the assessments and benefits as finally equalized by the board, extended into columns and added."

We have already set out section 42-721, G. S. 1949, so it will not again be set out here.

There is then a provision for the dissolution of the district upon petition of the majority of the members of the board of directors and the approval of the chief engineer, a provision that the sections and provisions of the act are severable and not matters of mutual, essential inducement and that if any part of the act is held unconstitutional for any reason it was the intention that the remaining sections and provisions be in full force and effect.

There are provisions for changing the boundaries of the district and some other provisions with which we are not now concerned.

The trial court here found that all steps leading to the incorporation of the district had been duly performed and could not be questioned in this action. No cross appeal was taken from this order and it has become final. Besides the point was settled by what we held and said in *State, ex rel., v. Knapp,* 167 Kan. 546, 207 P. 2d 440.

The proceedings are referred to here in detail for the purpose of demonstrating that in the early phases of the organization of the district the rights of landowners are meticulously safeguarded by the provisions of the statute and that the purpose of the act was that when a district was organized pursuant to it it should enter into contracts with the United States. Once we have reached this conclusion it is inescapable that the situation is governed in a large measure by applicable federal statutes. In *State ex rel., v. Knapp,* supra, in dealing with the same irrigation district we said:

"That Congress had authority to enact such legislation is thoroughly attested and is not questioned here. Under U. S. Const., art. 6, ¶ 2, these acts of Congress become a part of 'the supreme Law of the Land and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' In addition thereto the states of Colorado, Kansas and Nebraska, with the consent of Congress, have entered into what is known as the Republican river compact for the beneficial consumptive use of the waters of the Republican river."

Again—

"We must start with the realization that all the improvements being made or contemplated for the beneficial use of the waters of the Republican river are authorized by the acts of Congress and the Tri-State Compact, both of which are binding upon the state and all citizens or owners of property within the state. Hence, they are in no position to complain of the building of the Harlan dam to impound

water for flood control and irrigation or other works done under such acts of Congress or by compact."

This district, like the other districts and municipalities in the state, is a creature of the legislature. It has all the power that the statutes give it plus those generally conferred on quasi municipal and other corporations by operation of law. Once the corporation has gone through the organization stage the property owners who signed the original petition for its organization have no other or additional rights than those of the other property owners, residents and electors in the district. In *The State, ex rel., v. French,* 111 Kan. 820, 208 Pac. 664, in dealing with a school district problem, we said:

"Of course, county high-school districts and rural high-school districts, like many other municipalities, are purely creatures of the legislature; not only subject to its creative power but its power to modify or dissolve."

School District v. Board of Education, 110 Kan. 613, 204 Pac. 758, is a school-district consolidation case. This court upheld a statute which provided for consolidation and for the organization of certain districts. We stated the question to be:

"Third: The petition in each of the cases alleged that the plaintiff district at the annual meeting in April, 1921, made provision by a unanimous vote of the electors for sending the pupils of the district to other schools and for payment of the transportation and tuition for them, and made a levy of taxes to meet the expenses. It is contended that the act, if given a retroactive operation destroys the vested right of the district to exercise its corporate functions."

Then we said:

"The fact is there is no vested right in the existence of a municipal corporation. To put it another way, the existence of a municipal corporation is not a vested right. A school district is a mere quasi municipal corporation and municipal corporations generally 'are mere agencies of govern-

ment, and, except as specially restrained by other constitutional restrictions, are within the continued exclusive control of the legislature. Counties and towns are, as to their corporate existence, completely within such control. They may be changed, altered, enlarged, diminished or extinguished by the mere act of the legislature'."

Board of County Comm'rs v. Robb, 166 Kan. 122, 199 P. 2d 530, was a case in which we considered the constitutionality of a statute providing for drainage districts. One question was whether the statute was unconstitutional because it enabled the district to interfere with the functions of certain other districts. We said:

"A short answer is that both drainage districts and townships are creatures of the legislature and neither has any rights in a case such as is before us that the legislature may not alter at its pleasure."

The rule as to irrigation districts is laid down in 30 Am. Jur. 653, sec. 77, as follows:

"Irrigation districts are agencies established under governmental authority to accomplish the purpose of irrigation by the united efforts of landowners. Statutes providing for the organization and government of such districts and regulating the mode of assessments upon the lands therein are enacted pursuant to the power of the state to act for the public welfare, and usually are sustained as constitutional by both state and Federal courts. Thus, such acts have in many instances been upheld as against the contentions that they improperly delegate legislative or judicial power, violate the right to due process of law, or permit the taking of property for private use."

See, also, *Roby v. Drainage District,* 77 Kan. 754, 95 Pac. 399.

The plaintiffs recognize the force of the foregoing rule as to the district itself. They contend, however, that the rule is different as respects the rights of the individuals in the district. Plaintiffs argue that these individuals have acquired vested rights in the election which cannot be taken

away. We cannot see this distinction. In the opinions we have examined the trouble arose on account of contentions on the part of people generally, electors or taxpayers in the district, or who were affected by what happened in the district. We find no case where members of the group which initiated the organization of the district have rights different from those of the other taxpayers, electors or residents therein. The rule is stated in 16 C. J. S. Constitutional Law, p. 664 as follows:

"A taxpayer has no vested right that no change shall be made in the taxing statutes. There can be, therefore no vested right in the continuance of any particular tax or method of taxation, or any vested right securing one against the imposition of new taxes or their levy on a new basis. In the course of special assessment proceedings for local improvements, a property owner may acquire certain vested rights, but until vested rights have been acquired, the legislature may adopt new methods of financing improvement projects.

"A taxation statute, which by its terms is made retroactive, is within the power of the legislature and is not void as disturbing vested rights."

State, ex rel., v. North Wichita Drainage District, 127 Kan. 207, 272 Pac. 177, is informative partly because of the legislative history of the statute involved. Article 7 of Chapter 24 of the Revised Statutes of 1923 had provided for the organization of a drainage district under certain circumstances by application to the district court of the county in which the land sought to be drained was situated, and that the district court could if upon the hearing of such petition it deemed the petition to be sufficient appoint two commissioners to project, control and conduct the drainage. The statute then set out detailed provisions as to the conduct of the business to the district.

Chapter 163 of the laws of 1925 provided that after the proceedings had reached the point under the above statute where the court had provided the boundaries of the district and authorized the commissioners to proceed with the final plans, the commissioner should apply to the board of county

commissioners for the incorporation of a drainage district to be composed of the lands approved by the court to be benefited by the proposed drainage. The law then provided for a hearing and for the issuing of bond and for the levying of assessments to pay for these bonds. The act was attacked in *State, ex rel., v. North Wichita Drainage District,* supra, on one ground—that it impaired vested rights of property owners because a new method of financing drainage projects started under the old statute was adopted. We dealt with this argument in a summary manner and said:

"No right to benefit of the existing method of taxation had vested in any property owner when the statute was enacted, and no property owner has a vested right to the continuance of any particular method of taxation under which he has not been taxed."

This matter has been dealt with by many courts on the theory that the relationship between the state on the one hand and the signers of a petition creating a district on the other one was not a contract. One court said it is not "a matter of contract but a proceeding in invitum in the exercise of the state police power." (See *Northern Road Improv. Dist. v. Meyerman,* 169 Ark. 383, 275 S. W. 762.)

This court used similar language in an analogous case. (See *State, ex rel., v. Bone,* 120 Kan. 620, 244 Pac. 852.) There banks of the state had voluntarily joined a bank guaranty fund. At the time the fund was organized the statute provided member banks could quit the fund by taking certain steps and insuring certain liabilities. A subsequent statute amended the original one in regard to the liabilities. One bank argued that if the statute as amended be interpreted to increase its liabilities it would be in violation of article 1, section 10 of the constitution of the United States in that it would impair a contract. In dealing with this argument we said: "The statute is hardly contractual in its nature anyway. It was originally enacted and the successive changes from time to time

have been made in it, under and by virtue of the police power of the state." This court then pointed out that those who entered on enterprises such as the bank guaranty fund did so with the knowledge that the entity they are creating was a creature of the state acting through its legislature and subject to change as the legislature might deem to the best interests of all concerned.

On sober reflection this must be the law. To hold otherwise would be to open the door to all sorts of confusion when some enterprise did not turn out as anticipated. No one would care to deal with a municipal corporation such as the many districts in the state. To safeguard against any bad results from such a situation, the legislature threw the many safeguards around the organization of the districts that have been heretofore noted in this opinion.

The business of irrigation is a new one in this state. It would not do to hold that the statute in force when the district was organized constituted such a contract between the state on one hand and the incorporators of the district and other landowners therein on the other that it could not be changed by subsequent legislation. The entire affair is a matter of the police power of the state and subject to the legislative will. This is the effect of the holding in *LaMesa L. G. & S. Valley Irrig. Dist. v. Halley* (1925), 197 Cal. 50, 239 Pac. 719, where the court held that a statute under which an irrigation district was organized did not constitute the basis of a contract between the state and individual property owners in the state, incapable of impairment by the provisions of a subsequent statute. (See *Everglades Drainage Dist. v. Florida Ranch & Dairy Corp.* (1935); C. C. A. 5th), 74 F. (2d) 914, also *Northern Road Improv. Dist. v. Meyerman* (1925), 169 Ark. 383, 275 S. W. 762; also *Collins v. Jaicks Co.* (1919), 279 Mo. 404, 214 S. W. 391; also *Houck v. Little River Drainage Dist.* (1912), 248 Mo. 373, 154 S. W. 739 (affirmed in [1915], 239 U. S. 254, 60 L. Ed. 266, 36 S. Ct. 58.)

We conclude that the enactment of chapter 304 of the Session Laws of 1951 did not impair a contract in violation of article 1, section 10 of the constitution of the United States.

We go now to a consideration of Holding No. 1 of the trial court that chapter 304 of the Laws of 1951 constituted an unlawful delegation of nonjudicial functions and powers to the court and as such was in violation of the constitution of the state of Kansas. At the outset, we shall again refer to the provisions of chapter 304 of the Session Laws of 1951.

In the first place the proviso of chapter 304 enacted in lieu of the provisions of G. S. 1949, 42-721, provides for the filing by the board of directors of an action in the district court for the approval of any contract between the district and the United States and of the proposed assessments thereunder. It provides that a copy of the proposed schedule of assessments shall be attached to the petition or embodied therein.

The act then sets out how notice by publication shall be had. There is no dispute about that. It provides that within thirty days after the date of the first publication and not later than forty days thereafter any qualified owner of land within the district shall file his answer or other pleading challenging the assessment against his property. This in plain language means that the court shall take no action against any of the assessments unless some particular owner challenges the assessment by a pleading filed in the action.

A vigorous argument is made as to the next three provisions, that is, the assessments may be challenged if they are too high, erroneously computed or not uniformly assessed in proportion to other tracts in the district. This provision, however, must be construed in connection with the following language, which provides that the court shall hear evidence concerning the correctness and uniformity of the assessments and may modify the schedule of assessments in accordance with such evidence. The entire power of the court, however, is limited by the provision as follows:

"The court hearing such evidence shall review the schedule of assessments, as proposed by the board of directors and shall not disturb the findings and assessments of the

board unless the proposed assessments are manifestly disproportionate."

Regardless of the language in the early part of the act, where it speaks of assessments being too high, erroneously computed or not uniformly assessed in proportion to other tracts, and the court being given power to modify the schedule of assessments, the court's power is limited by the quoted langauge. It can only modify the schedule of assessments where some particular assessment is found to be "manifestly disproportionate" and that manifest disproportionment must be challenged by a pleading filed in the action within the time provided.

The provision of the state's statute providing for the organization of drainage districts have been already set out in this opinion. The matter of the organization of the drainage district was before this court in *State, ex rel., v. Knapp,* supra. In that opinion we pointed out that this project is all a part of a general plan of congress authorized by the acts of congress.

As already quoted in this opinion, we said there:

"Before taking up the specific questions submitted for determination by the stipulation we must take note of the fact that the defendant, Kansas Bostwick Irrigation District No. 2, is but a small part of the large project of the federal government authorized by the Act of Congress of December 22, 1944 (58 Stat. 887), pursuant to which the United States is constructing the Missouri River Basin Project as set forth in House Document 475 and Senate Document 191, as revised and co-ordinated by Senate Document 247, all of the 78th Congress, second session. (See 43 U. S. C. A. § 371 *et seq.*, including the above and related Acts of Congress.)"

We further said:

"That Congress had authority to enact such legislation is thoroughly attested and is not questioned here. Under U. S. Const., art. 6, ¶ 2, these acts of Congress become a part of the 'supreme Law of the Land and the Judges in every State shall be bound thereby, any Thing in the Con-

stitution or Laws of any State to the Contrary notwithstanding.' In addition thereto the states of Colorado, Kansas and Nebraska, with the consent of Congress, have entered into what is known as the Republican river compact for the beneficial consumptive use of the waters of the Republican river."

G. S. 1949, 42-711, provides amongst other things, as already quoted herein, that the board of directors shall have full power to do any and all things required by federal statutes and rules and regulations thereunder for the construction, operation and maintenance of any necessary irrigation works. Chapter 304 of the Laws of 1951 in a provision, the validity of which is not questioned, provides that "any irrigation district may enter into an agreement with the United States or any department, bureau or agency thereof in pursuance of the federal laws governing such department, bureau or agency." All the pertinent federal statutes, the compact between Kansas, Nebraska and Colorado, the contract between the district and the United States, G. S. 1949, 42-701 to 42-730, and chapter 304 of the Laws of 1951, must be construed together. It is our duty to uphold legislation, rather than to defeat it, and if there is any reasonable way to construe legislation as constitutionally valid it should be so construed. Chapter 304 of the Laws of Kansas of 1951 when so construed limits the power of the district court. This power must also be construed in connection with the provisions of the pertinent federal statutes. One of these provisions is

"That no contract with an irrigation district under this and the two following sections shall be binding on the United States until the proceedings on the part of the district for the authorization of the execution of the contract with the United States shall have been confirmed by decree of a court of competent jurisdiction, or pending appellate action if ground for appeal be laid." (43 U. S. C. 345, § 511.)

The power is judicial, not legislative. Chapter 304 of the Session Laws of 1951 does not confer legislative power upon the district court of Republic county.

(See *City of Salina v. Thompson, Trustee of Mo. Pac. Rly. Co.*, 169 Kan. 579, 220 P. 2d 147; also 44 C. J. 590.)

We pass now to a consideration of Conclusions of Law No. 4 of the trial court, that chapter 304 of the Session Laws of 1951 is invalid insofar as it purports to confer jurisdiction on the court to pass upon assessments as against the owners of irrigable land in the district because no standard or set of rules is provided by which the court may determine such assessments and it takes from the board of directors of the district a vested right to determine such assessments and the needs of the district in respect thereto. We have already determined in this opinion the only power the court has with respect to assessments is to determine whether any particular assessment against some particular tract of land is manifestly disproportionate. The court has no jurisdiction nor power to modify the schedule of assessments generally or otherwise than above. The contract between the district on one hand and the United States on the other provides that the land shall be divided into three classes by the secretary of the interior and that the assessments shall be made by taking into account the number of acres of land and their productivity, taking into account soils, topography and other relevant conditions. This is all a matter of expert testimony and is no more difficult of ascertainment than many other matters with which the courts are confronted. The federal statutes provide for this classification and for a reclassification under certain circumstances. At any rate, it is of no concern to the trial court in this action other than for the light it throws on the question whether some particular assessment against some particular tract is manifestly disproportionate.

We conclude the act was not unconstitutional for the reason given in Conclusion No. 4.

We shall next consider Conclusion No. 7 of the trial court that chapter 304 of the Statutes of 1951 is invalid because as construed by the trial court the court must make binding assessments at the time the contract is approved and there is no standard of rules to be observed in passing thereon. The court is in error in holding that the statute requires

that it must make a final finding upon the schedule of assessments. As already held, the court's sole power is to set aside any assessment that is manifestly disproportionate. G. S. 1949, 42-715, provides for a uniform assessment of all the lands in the district in March of each year. G. S. 1949, 42-717, provides for an equalization of these assessments in May of each year. The provision as to the finality of the court's order upon approving the contract as to the assessment must give way to these two provisions. Furthermore, the federal statutes and the provisions of the contract provide that the question of assessments must be re-examined every year.

The entire science of irrigation is such that the federal statutes require a reclassification of lands within a district upon request. (See 43 U. S. C. A., Sec. 485g[c].) This provision is embodied in the contract in Section 16, Part B. Section A of the same part provides for the cost of the construction of the district estimated assessed at $3,500,000, being apportioned amongst the land in the district and one-fortieth of that cost being paid annually for forty years. There is a reason for this reclassification and reassessment. Over the period of forty years the science of agriculture will change. What would be approved practice tending to greater productivity today might not be the case forty years from today. Land that was most productive under the present art of husbandry might fall into one of the lower classes in the progress of the years. It would not do to place the stamp of finality upon any schedule of assessments made under present day conditions. (See 43 Stat. 702, subsection D, *et seq.*)

The only question is how this will be apportioned amongst the various tracts in the district. The entire matter is left to reassessment every year. It is a matter of the internal affairs of the district and cannot be settled with finality at the trial upon the petition to confirm or approve the contract.

We now shall consider Conclusion No. 9 of the trial court. This is that the contract is so uncertain and indefinite in its terms and conditions as to not present any issue that could

be passed upon or approved by the court. As we have heretofore held, the only matter with which the court need concern itself is whether there is any tract of land, the assessment of which is manifestly disproportionate. We find no such uncertainty as to permit a striking down of this statute.

We next consider Finding No. 10 of the trial court. This is that there is direct conflict between the provisions of the federal statutes and the state statutes. We have demonstrated that the federal statutes, the state statutes, the contract between the district court and the United States and the Republican river compact must all be construed together.

It is the duty of all courts to so interpret, apply and construe a statute as to result in it being held valid, when such an end can be reasonably attained. All these acts provide a pattern for the organization of irrigation districts. The contract naturally had to meet the requirements of the statutes, both state and federal. The only matters with which the trial court was concerned are (1) whether the proceedings on the part of the district for the authorization of the execution of the contract had been carried out in a valid manner. These proceedings are not attacked here and anyway were approved by our decision in *State, ex rel., v. Knapp*, supra, and (2) whether the assesssment as to any particular tract of land was manifestly disproportionate, as we have held this is a judicial question and the only one about which the trial court in this action is concerned. We find no such conflict as will require the striking down of the statute.

We find it unnecessary to examine the other conclusions of the trial court. They are all settled by what we have already said.

The judgment of the trial court is reversed and it is directed to dissolve the injunction heretofore issued against the board of directors of the district restraining them from proceeding further with the action in the court entitled "In Re Kansas Bostwick Irrigation District No. 2, A Corporation, No. 10,556" and the court is directed to proceed with

the determination of that action and to determine whether any assessment as to any particular tract of land, which assessment was challenged in a pleading filed by the owner of that particular tract in due time, was manifestly disproportionate, and if he finds no such assessment to be manifestly disproportionate, to approve and to confirm the contract.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 752

CHARLES MIZER, R. J. SWEARINGEN, ELMER E. ANDERSON AND HOWARD BARBER,

Appellants,

vs.

KANSAS-BOSTWICK IRRIGATION DISTRICT NO. 2, F. H. GARMAN, WARD DOUGLAS, ALBERT BILLING AND FRED SWOYER, FOR HIMSELF AND OTHER LANDOWNERS SIMILARLY SITUATED AS INTERVENERS

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

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FRED SWOYER,
For Himself and Other Landowners,
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SUPREME COURT OF THE UNITED STATES

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KANSAS-BOSTWICK IRRIGATION DISTRICT NO. 2, F. H. GARMAN, WARD DOUGLAS, ALBERT BILLING AND FRED SWOYER, FOR HIMSELF AND OTHER LANDOWNERS SIMILARLY SITUATED AS INTERVENERS

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

STATEMENT AGAINST CLAIM OF JURISDICTION OF SUPREME COURT OF THE UNITED STATES TO REVIEW, ON APPEAL, THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF KANSAS.

Pursuant to Supreme Court Rule 12, Par. 3, the Kansas-Bostwick Irrigation District No. 2, F. H. Garman, Ward Douglas, Albert Billing, and Fred Swoyer, for himself and

other landowners similarly situated, file this, their statement as showing that this court should not assume or retain jurisdiction of this appeal; and this statement is further filed in support of a Motion to Dismiss this appeal.

1. The said district is incorporated and functioning under federal and state laws for the public purpose of developing irrigation, and the said Garman, Douglas and Billing are the duly elected, qualified and acting members of the Board of Directors, as provided by Chap. 42, Article 7 of G. S. of Kansas, 1949. The said Fred Swoyer, for himself and other landowners similarly situated intervened in the action, wherein the judgment complained of was entered; and the appellants herein are likewise landowners of said district, and who filed said action for themselves and other landowners similarly situated.

2. The said district was incorporated in the year 1948, under the said Art. 7, which was new legislation in the State of Kansas. In the same year there was enacted by the legislature of Kansas, a new water law. In the year 1949, such laws were upheld by the Supreme Court of the State of Kansas, and at the same time the validity of said district was sustained. See *State, ex rel.* v. *Knapp,* 167 Kan. 546, 207 P. 2d 440. That court succinctly pointed out the reasons for this new legislation, and creation of said irrigation district, as follows:

> "Before taking up the specific questions submitted for determination by the stipulation we must take note of the fact that the defendant, Kansas-Bostwick Irrigation District No. 2, is but a small part of the large project of the federal government authorized by the Act of Congress of December 22, 1944 (58 Stat. 887), pursuant to which the United States is constructing the Missouri River Basin Project as set forth in House Document 475 and Senate Document 191, as revised and coordinated by Senate Document 247, all of the 78th

Congress, second session. (See 43 U. S. C. A. #371 et seq., including the above and related Acts of Congress.)—" . . .

"That Congress had authority to enact such legislation is thoroughly attested and is not questioned here. Under U. S. Const., art. 6, #2, these acts of Congress become a part of 'the supreme Law of the Land and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' In addition thereto the states of Colorado, Kansas and Nebraska, with the consent of Congress, have entered into what is known as the Republican river compact for the beneficial consumptive use of the waters of the Republican river. (See G. S. 1947 Supp. 82a-518, for its terms and the map showing its location.) Such a compact is binding upon the citizens of each state and on the judicial and the executive branches of the state government. (See 59 C. J. 37 and authorities there cited.)" (167 Kan. 550).

3. After reviewing the statutory provisions involved in such action the court concluded:

"We next observe that no complaint is made of section 702, which declares: 'All water within the state of Kansas is hereby dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner herein provided.' This is the heart of the statute. The rest of it treats of details and procedure." (167 Kan. 555).

4. Such Supreme Court then concluded that the said irrigation and water laws were valid, and did not infringe upon state and federal constitutional provisions.

5. The district then proceeded to contract with the federal government as authorized by the state and the federal laws. See Kan. G. S. 1949, 42-711 and 721. In the meantime, the 1951 session of the Kansas Legislature amended

42-721 as shown by Part II of the statement of the appellants herein.

6. Then this action was instituted in the state courts for an injunction to restrain the district and its Board of Directors from carrying out the contract with the Federal Government, because it was claimed, that the change in the law took from the landowners, vested rights which they had in the law amended. Several contentions were made in the state courts, but there remains but one, and that is impairment of their claimed contract under the amended law, which gave them the right to vote upon the contract, and which right they say was wrongfully taken from them by the 1951 enactment set out in the statement of appellants and which is Chap. 304 of the Laws of Kansas of 1951.

7. The sole question before this court is whether or not such 1951 legislation impaired the obligation of a contract in violation of art. 1, sec. 10 of the Constitution of the United States. The district and the persons named, as appellees herein, insist that there was and is no contract under 42-721, before amended; Charles Mizer, et al., as appellants herein contended before the state courts that such section constituted a contract between the state and the landowners, which gave them the right to vote upon the contract; which contractual right was impaired by the 1951 amendment to such section. This is the same contention now made to this court. The decisions cited in paragraph V of appellant's statement do not sustain the jurisdiction of this court. The first, *Atlantic Coast Line R. Co.* v. *Phillips*, considered a contract for tax exemption, created by the legislative franchise to the Railroad Company. This was a contract between the parties, in consideration of the construction of a railroad. In the present matter, no contract was created by 42-721, before amended, that the electors must approve the contract to accomplish irrigation.

8. *Millsaps College* v. *City of Jackson*, also considered a charter whereby the college lands and buildings thereon were exempted from taxation. Again, there was no question as to such creating contractual rights, which exempted the college from taxes.

9. *Chicago, B. & Q. R. Co.* v. *Nebraska ex rel. Omaha* was a mandamus to compel the railroad to repair a viaduct in accordance with a state statute, and the defense was that a contract was created by certain laws and ordinances, which had been impaired by such later state statute. It was held that the court had jurisdiction "to determine for itself the existence or the nonexistence of the contract set up, and whether its obligation has been impaired by the state enactment." But it was held, since the railroad was constructed for a public purpose the legislature could compel it to do whatever was best for the public welfare.

10. The fourth case cited by appellants is *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 4 L. Ed. 629. This decision makes it clear, had the college been a public corporation, then the charter could have been amended by subsequent legislation. The holding on this point being as follows:

> "If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the state of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States."

11. The Supreme Court of Kansas in the decision questioned by this appeal, *Mizer* v. *Irrigation District*, definitely held the Irrigation District to be a state municipality cre-

ated to be employed in the administration of the government. In fact, it was created to carry out the governmental purposes of the United States as well as the State of Kansas. This was pointed out in paragraph 2 of this statement. In that decision a number of Kansas authorities are cited as fully supporting the conclusion that the District is an arm of the state to carry out the purposes of the state and the federal government. This brings it within the rule quoted from the *Dartmouth College* case, and no contractual rights were conferred by the state to the landowners within the district.

12. First, and most important, is the fact that said irrigation district is a public municipal corporation with only those powers that are given by the legislature, and which powers may be increased, modified, or taken away by the legislature without the consent of any of the landowners or others interested in the district.

13. The general rule on the subject is well stated in 30 Am. Jur. 653, and is well supported by the decisions of this court as well as by other courts.

> "Irrigation districts are agencies established under governmental authority to accomplish the purpose of irrigation by the united efforts of landowners. Statutes providing for the organization and government of such districts and regulating the mode of assessments upon the lands therein are enacted pursuant to the power of the state to act for the public welfare, and usually are sustained as constitutional by both state and Federal courts." (30 Am. Jur. 653.)

14. See also 30 Am. Jur. 654 on the same subject.

> "Although organized to conduct a business for the private benefit of the owners of land within its limits, it is generally held that an irrigation district is a public or quasi-public corporation." (30 Am. Jur. 654.)

15. There is cited in support of the foregoing statements the following authorities:

> "Tulare Irrig. Dist. v. Shepard, 185 U.S. 1, 46 L. Ed. 773, 22 S. Ct. 531; Fallbrook Irrig. Dist. v. Bradley, 164 U.S. 112, 41 L. Ed. 369, 17 S. Ct. 56; Re Madera Irrig. Dist., 92 Cal. 296, 28 P. 272, 675, 14 L.R.A. 755, 27 Am. St. Rep. 106." (30 Am. Jur. 653.)

16. The decision in the *Tulare Irrigation Dist.* case points out that the Supreme Court of California has held irrigation districts to be public municipal corporations, and this court accepted such determination.

17. *Mizer* v. *Kansas Bostwick Irrigation District,* 172 Kan. 157, makes the same determination and also stated:

> "This district, like the other districts and municipalities in the state, is a creature of the legislature. It has all the power that the statutes gives it plus those generally conferred on quasi municipal and other corporations by operation of law. Once the corporation has gone through the organization stage the property owners who signed the original petition for its organization have no other or additional rights than those of the other property owners, residents and electors in the district." (172 Kans. 169.)

18. *Hunter* v. *Pittsburg,* 207 U. S. 161, 52 L. Ed. 151, 28 Sup. Ct. Rep. 40, was concerned with a law which permitted a larger city to outvote a smaller city and thus compel a consolidation. This court held that: "the policy, wisdom, justice and fairness of a state statute is not subject to review or criticism by the Federal Supreme Court." (2nd Syl.) It was asserted in that case:

> "that the act of assembly impairs the obligation of a contract existing between the city of Allegheny and the plaintiffs in error, that the latter are to be taxed only for the governmental purposes of that city, and that the legislative attempt to subject them to the taxes of the

enlarged city violates article 1, #9, #10, of the Constitution of the United States. This assignment does not rest upon the theory that the charter of the city is a contract with the state, a proposition frequently denied by this and other courts. It rests upon the novel proposition that there is a contract between the citizens and taxpayers of a municipal corporation and the corporation itself, that the citizens and taxpayers shall be taxed only for the uses of that corporation, and shall not be taxed for the uses of any like corporation with which it may be consolidated. It is not said that the city of Allegheny expressly made any such extraordinary contract, but only that the contract arises out of the relation of the parties to each other. It is difficult to deal with a proposition of this kind except by saying that it is not true. No authority or reason in support of it has been offered to us, and it is utterly inconsistent with the nature of municipal corporations, the purposes for which they are created, and the relation they bear to those who dwell and own property within their limits. This assignment of error is overruled." (28 S. Ct. 45 and 46.)

19. The *Hunter* case also held:

"Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state, as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the mean-

ing of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation." (28 S. Ct. 46.)

20. *There was no contract made with the landowners to hold an election.* As pointed out above, the district is a public corporation and exercises the powers and rights conferred upon it and its officers, which powers and rights may be modified or taken away. This is particularly true as to matters pertaining to taxation, as said in 16 C. J. S. on Constitutional Law, P. 664:

> "A taxpayer has no vested right that no change shall be made in the taxing statutes. There can be, therefore, no vested right in the continuance of any particular tax or method of taxation, or of any vested right securing one against the imposition of new taxes or their levy on a new basis."

21. There may be a vested right and still no impairment of contract, as was pointed out in *Crane* v. *Hahlo*, 258 U. S. 142, 66 L. Ed. 514, 42 S. Ct. 214, where it was held as stated in the first syllabus.

> "The right of an abutting owner to compensation for a change in the grade of a street under a statute providing for such compensation was a vested property right after the completion of a viaduct in the street, but was not a contract right within Const. art. 1, #10, relative to the impairment of contracts, as the word 'contracts' is used therein in its usual or popular sense as signifying an agreement of two or more minds upon sufficient consideration to do or not to do certain acts." (42 S. Ct. 214).

22. This case of *Crane* v. *Hahlo* cited many decisions of this court as to what constituted a contract as follows:

> "It has long been settled by decisions of this court that the word 'contracts' in section 10 of article 1 of the Constitution is used in its usual or popular sense as signifying an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts. 'Mutual assent (express or implied) to its terms is of its very essence.'" (42 S. Ct. 215).

23. This same case makes it clear that the legislature could change the procedure for entering into the contract and the levying of taxes and that:

> "No one has a vested right in any given mode of procedure (Railroad Co. v. Grant, 98 U.S. 398, 401, 25 L. ed. 231; Gwin v. United States, 184 U.S. 669, 674, 22 Sup. Ct. 526, 46 L. Ed. 741), and so long as a substantial and efficient remedy remains or is provided due process of law is not denied by a legislative change (Oshkosh Waterworks Co. v. Oshkosh, 187 U.S. 437, 439, 23 Sup. Ct. 234, 47 L. ed. 249)." (42 S. Ct. 216).

24. *Houck* v. *Little River Drainage Dist.* 239 U. S. 254, 36 S. Ct. 58, 60 L. Ed. 266, is exactly in point to the effect that there was no contract created by 42-721 of the Kansas Law before the same was amended by Chap. 304 of the Laws of 1951. The *Houck* case reviewed a decision from the State of Missouri as reported in 248 Missouri 373, 154 S.W. 739, wherein a law was enacted, after the district was created, authorizing the Board to levy upon each acre of land in the district, not to exceed twenty five cents per acre, to pay all preliminary expenses. It was held by the state of Missouri that since this was a public subdivision of the state for a public purpose, that of draining swamp and overflowed lands, that the legislature might authorize

the collection of necessary taxes in any way deemed best; and that the general benefits accruing authorized such being done. When the case went before the Supreme Court of the United States it was held that such increase in taxes after the district was created did not violate article 1, section 10 of the United States Constitution. This court first held that this public corporation was subject to the legislative enactments of the state of Missouri; and that the state might defray the entire expense out of state funds raised by general taxation, or an apportionate burden among the counties in which the landowners were situated or created tax districts to meet the authorized outlays; and that such did not take property without due process of law, contrary to the 14th amendment to the United States Constitution. It was also urged that this increase in taxes after the district was chartered, impaired the obligation of contract as protected by section 10 of article 1 of the United States Constitution. This court considered the decision of the Missouri Supreme Court and then concluded:

> "In that opinion, however, after referring to the stipulation, the court proceeded to observe that the charter of the district, as a public corporation, did not constitute a contract with its members that the laws it was created to administer would not be changed. If this can be considered to be a decision of the question, we see no reason to disturb it. Laramie County v. Albany County, 92 U.S. 307, 310, 23 L. Ed. 552, 554; New Orleans v. New Orleans Water-works Co., 142 U.S. 79, 89, 35 L. ed. 943, 946, 12 Sup. Ct. Rep. 142; Worcester v. Worcester Consol. Street R. Co., 196 U.S. 539, 551, 49 L. ed. 591, 596, 25 Sup. Ct. Rep. 327; Seattle v. Kelleher, supra." (S. Ct. 36, P. 62).

25. Thus, we have a direct holding of no contract with the landowners, that the laws governing the district would

not be changed. There has never been pointed out the parties to the so-called contract, the obligations arising thereunder nor how the same was impaired. All the complaining landowners have ever urged is that under the old law a majority of the electors, not landowners, were given the right to pass upon the contract made between the District Board and the Secretary of Interior. The laws under which the district was created, and which govern its control, are always subject to change, and such do not constitute a contract with the landowners in the district; and no authority has been cited that holds to the contrary. As pointed out in *Detroit United Railway* v. *Michigan*, 242 U. S. 238, 37 S. Ct. 87, 90, there must be (1) a contract, (2) an obligation thereunder and (3) an impairment by subsequent legislation. None of these essentials exist in this case.

26. *No complaint is made as to the terms of the contract between the district and the United States, nor as to the proposed assessments.* The only complaint made by the landowners bringing this suit, is that the right of a majority of the *electors* were required to approve the contract under the amended law. It would be conceded that had the charge been made that these proposed assessments, to carry out the contract, were questioned as to being unreasonably discriminatory, then a question would have been raised as to violation of the 14th Amendment to the United States Constitution. See *Memphis and C. R. Co.* v. *Pace*, 282 U. S. 241, 75 L. Ed. (Adv. 178), 51 S. Ct. 108.

27. Had there been an issue of bonds or other obligations of the district, and the law been changed as to the taxes to be raised to pay off the bonds, and such changed the source of revenue, to their detriment, then the bondholders might properly urge impairment of their contract,

such contract being the bonds held by them. See the annotation in 156 A.L.R. 1264, where many authorities, including the decisions of this court, are cited in support of that proposition.

28. If this case involved tax exemptions or tax limitations granted by the legislature to certain land within the district, and then the law was changed whereby such exemptions or limitations were modified to the detriment of the owners of such lands, then there would be an impairment of contract, as pointed out in *Atlantic Coast Line RR. Co.* v. *Phillips*, 332 U. S. 168, 91 L. Ed. 1977, 173 A.L.R. 1, 67 S. Ct. 1584, and the annotation on that subject beginning in 173 A.L.R. 15.

29. In paragraph VI of the Appellants' Statement the following is set forth as to why this court should consider this appeal:

> "The questions involved on this appeal are substantial. From the standpoint of the plaintiffs and the other landowners in the district the issues are important since the defendants are seeking to impose upon them onerous tax burdens which will arise if the proposed irrigation program is put into effect. The questions involved are not frivolous, nor are they already settled. There are no federal cases exactly in point which answer the problems presented on this appeal."

30. The foregoing are mere conclusions and do not point out any contract as between the State of Kansas and the landowners, hence there could be no impairment. If such conclusions state any contention, such relate to alleged "tax burdens," not a claimed contract. If a question of tax burdens is before the court, then such would arise under the 14th Amendment to the Constitution. This claim was made before the State Courts, but the errors assigned

for this appeal relate only to article 1, of section 10 of the Constitution, unless it be No. 3, which is a general charge of repugnancy to the Constitution. There have already been cited in this statement, in paragraphs 24 and 26, the decisions of *Houck* v. *Little River Drainage Dist.* and *Memphis & C. R. Co.* v. *Pace*, both of which cases are to the point that the states may authorize their municipalities to levy such taxes as may be needed, so long as such are not "manifestly and unreasonably discriminatory." It has never been contended by these appellants that the proposed assessments fell within this limitation. What was claimed before the courts is that Chap. 304 of the Laws of 1951 delegated nonjudicial powers to the District Court, contrary to the Constitution of the State of Kansas, because such law required the court to finally determine these assessments. The District Court of the State of Kansas so concluded, but the Supreme Court reversed such holding as shown by the following:

> "The court is in error in holding that the statute requires that it must make a final finding upon the schedule of assessments. As already held, the court's sole power is to set aside any assessment that is manifestly disproportionate. G.S. 1949, 42-715, provides for a uniform assessment of all the lands in the district in March of each year. G.S. 1949, 42-717, provides for an equalization of these assessments in May of each year. The provision as to the finality of the court's order upon approving the contract as to the assessment must give way to these two provisions. Furthermore, the federal statutes and the provisions of the contract provide that the question of assessments must be re-examined every year.
>
> The entire science of irrigation is such that the federal statutes require a reclassification of lands within a district upon request. (See 43 U. S. C. A., Sec. 485g (c).) This provision is embodied in the contract in

> Section 16, Part B. Section A of the same part provides for the cost of the construction of the district estimated assessed at $3,500,000, being apportioned amongst the land in the district and one-fortieth of that cost being paid annually for forty years. There is a reason for this reclassification and reassessment." (172 Kan. 176 and 177.)

31. Thus, it is clear that the decision of the Supreme Court of Kansas leaves wide open the question of assessments against the different tracts of land within the district, and which are to be later determined in accordance with the benefit accruing to such land by reason of this irrigation works. This is exactly the requirements of the federal and state laws as shown by the extract from the decision of the Supreme Court of Kansas, as above set out.

32. In the petition filed by the appellants when this suit was started it was charged that Chap. 304 of the Laws of 1951 violated article 1 of section 10 of the U. S. Constitution, and:

> "that the defendants are threatening to carry out the provisions of the aforesaid void statute in violation of the vested rights of plaintiffs and the other landowners aforesaid in violation of the due process clause of the 14th Amendment to the Constitution of the United States."

33. As already pointed out, the *Houck* and the *Memphis* cases, as well as many other decisions of this court, have held that there can be no violation of the 14th Amendment, unless the assessments are manifestly disproportionate; and the decision of the Supreme Court of Kansas, sought to be reviewed by this appeal, makes it clear that, if at any time these assessments are manifestly disproportionate, the courts of Kansas will rectify such assessments. How-

ever, there never was any claim that the proposed assessments, presented to the trial court, were manifestly disproportionate in any respect. Besides, that question is for future consideration, and the landowners will annually be given notice and hearing to pass upon these assessments before any levy of taxes can be made. (See Kansas G. S. 1949, 42-717.) (See also the decision sought to be reviewed by this appeal.)

Since there is no claim of discriminatory taxes and no showing of a contract, the Supreme Court of the United States should not assume the jurisdiction of this appeal, but should sustain the Motion to Dismiss the same, and which motion is filed herewith.

NELSON J. WARD,
Attorney for Kansas-Bostwick Irrigation Dist. and Its Officers,
Belleville, Kansas.

FRED SWOYER,
For Himself and Other Landowners,
Belleville, Kansas.

Filed 4-12-52.

Motion to Dismiss Appeal

Now comes the Kansas-Bostwick Irrigation District No. 2, F. H. Garman, Ward Douglas, Albert Billing and Fred Swoyer, for himself and other landowners similarly situated as interveners, and move the Supreme Court of the United States to dismiss this appeal because of lack of substantiality in the claimed federal question, that Chap. 304 of the Kansas Laws of 1951 impairs a contract with the landowners of said district, by amending Kansas 1949 G. S., 42-721.

In support of this Motion to Dismiss there is filed herewith, a statement of said parties as against the claim of jurisdiction, as made by the appellants herein.

N. J. WARD,
Attorney for Kansas-Bostwick Irrigation District, and Ward Douglas, F. H. Garman and Albert Billing,
Belleville, Kansas.

FRED SWOYER,
For Himself and Other Landowners Similarly Situated,
Belleville, Kansas.

8

FILED
MAY 5 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

No. 752

CHARLES MILLER, R. J. SWEARINGEN, ELMER E. ANDERSON AND HOWARD BARKER, *Appellants*

vs.

KANSAS-BOSTWICK IRRIGATION DISTRICT NO. 2, F. H. GARMAN, WARD DOUGLAS, ALBERT BILLINGS, and FRED SWOYER, for himself and other landowners similarly situated as Interveners, Appellees

Appeal from the Supreme Court of the State of Kansas

BRIEF OF APPELLANTS OPPOSING APPELLEES' MOTION TO DISMISS

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IN THE SUPREME COURT OF THE UNITED STATES

No. _____

CHARLES MIZER, R. J. SWEARINGEN, ELMER E. ANDERSON AND HOWARD BARBER, *Appellants*

VS.

KANSAS-BOSTWICK IRRIGATION DISTRICT NO. 2, F. H. GARMAN, WARD DOUGLAS, ALBERT BILLINGS, and FRED SWOYER, for himself and other landowners similarly situated as Interveners, Appellees

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Appeal from the Supreme Court of the State of Kansas

BRIEF OF APPELLANTS OPPOSING APPELLEES' MOTION TO DISMISS

In connection with their Motion to Dismiss the appellees have filed a statement against the claim of jurisdiction of the Supreme Court to review this appeal. The sole basis for the motion to dismiss is that there is a lack of substantiality in the claimed federal question that the state statute assailed as unconstitutional impairs a contract of the appellants. In support of their motion the appellees argue that no contract right of appellees has been impaired and therefore Article 1, section 10 of the Constitution has not been

violated. This argument is directed not at the jurisdiction of the court to hear the appeal but rather involves the merits of the case itself.

The appellants in their Statement of Basis of Jurisdiction have not considered it proper to go into the various questions which will be fully covered in the brief of appellants which will be prepared after the record is printed. The only cases cited by appellants are those cases which sustain the jurisdiction of the Supreme Court of the United States to review the judgment of the Supreme Court of the State of Kansas. The rule seems to be well settled that a claim of a private citizen that a state statute impairs a contract obligation is an appeal to the United States Constitution and cannot be foreclosed by a state court's determination whether there was a contract or what were its obligations. *Atlantic Coast Line R. Co. v. Phillips, Ga.* 1947, 67 S. Ct. 1584, 332 U. S. 168, 91 L. Ed. 1977, 173 A.L.R. 1. In *Millsaps College v. City of Jackson, Miss.* 1927, 48 S. Ct. 94, 275 U. S. 129, 72 L. Ed. 196, the Supreme Court held that a decision of a state court upholding a state tax on college property which was challenged in the court below as impairing the charter rights to exemption in violation of the Federal Constitution, is subject to review by the United State Supreme Court. In *Chicago, B. & Q. R. Co. v. Nebraska, ex rel. Omaha,* 170 U. S. 57, 18 S. Ct. 513, 42 L. Ed. 948, the Supreme Court held that a federal question is raised by an unsuccessful contention in a state court that the obligations of a contract have been impaired by state statute and ordinances. The same rule is recognized in *Trustees of Dartmouth College v. Woodward,* 4 Wheat 518, 4 L. Ed. 629. The above cases are not cited for the purpose of argument of appellants' case on the merits; they are cited because they are examples of a multitude of decisions which sustain the jurisdiction of the Supreme Court of the United States to review a

judgment of a state supreme court where it has been contended that obligations of a contract have been impaired by a state statute.

In the instant case the facts are substantially as follows: Some time prior to July of 1948 some of the landowners of Republic and Jewell Counties in Kansas became interested in the possibility of irrigation for their lands by utilization of the waters stored at the Harlan dam across the Republic River, about 80 miles to the west in Nebraska. At that time there existed a sharply divided difference of opinion among the landowners as to the desirability and feasibility of irrigation in that area. This difference of opinion has continued down to the present time. In any event sufficient interest was manifested in irrigation prior to July 1948 to cause the circulation of a petition for the organization of an irrigation district for the area. Under Kansas General Statutes of 1949, 42-701 and following, the organization of an irrigation district was accomplished by petition of a majority of the qualified owners of irrigable lands within a proposed district to the chief engineer of the Kansas state division of water resources. After his approval was obtained a charter was issued by the Kansas secretary of state. Prior to 1951 the law (Kansas G.S. 1949, 42-721) provided that no assessments should be made against the lands of any person in the district without the proposal or contract being first submitted to the electors of the district and approved by a majority of the electors of the district. This law was in effect when the Kansas-Bostwick Irrigation District No. 2 was organized, and the appellants and other landowners who were somewhat skeptical of the irrigation project, signed the petition for its organization under the inducement and with the definite understanding that before their lands could be subjected to assessments for irrigation development, they would have the right to vote on the proposal or contract. In

other words they were advised by the circulators of the petition for organization of the irrigation district that they were protected by the statute in the event they should disapprove of any proposed contract for irrigation because they should have the right to vote before their lands could be subjected to assessments.

With that understanding in mind the appellants and many other landowners signed the petition for organization of the district. The petition was filed with the chief engineer of the Division of Water Resources of the Kansas State Board of Agriculture on July 18, 1948; a hearing was had on the petition on September 21, 1948, and the chief engineer granted the petition. No appeal was taken and transcript of the proceedings was filed with the Secretary of State on October 26, 1948. Articles of incorporation were issued and recorded, and thereafter the district elected its officers.

The appellees, F. H. Garman, Ward Douglas and Albert Billings, are the officers of the district. On or about April 20, 1951, a contract was entered into between the Kansas-Bostwick Irrigation District No. 2 and the United States providing for irrigation within the district.

At this point in the history of the case at bar all is calm; there is no controversy. Under Kansas G. S. 1949, 42-721, the contract entered into between the irrigation district and the United States must be first submitted to the electors of the district and approved by a majority of the electors of the district before any assessment could be made against the lands of any person in the district. Under the statute electors must be landowners and residents of the state of Kansas. But no election was called by the board for the approval of the contract by the electors of the district.

Instead the statute which is assailed in the instant case was passed by the Kansas 1951 legislature which statute abolishes the right of the landowners in the district to vote on pro-

posals or contracts entered into by the officers of irrigation districts and in its place sets up a procedure whereby the board of directors of the district file an action in the state district court for the approval of the contract and the equality of the assessments by the district court. The landowners in the district no longer have the right to vote on proposed contracts which may result in assessments against their lands.

The appellees, Kansas-Bostwick Irrigation District No. 2 and it board of directors then proceeded to file an action in the District Court of Republic County, Kansas, to have that court approve the contract and the schedule of assessments.

After that action was filed for approval of the contract, the appellants on behalf of themselves and over 200 other landowners similarly situated filed the case at bar in the District Court of Republic County, Kansas, pursuant to the Kansas Declaratory Judgment Act, Kansas G. S. 1949, 60-1121 and G. S. 1949, 60-3127, seeking an injunction to enjoin the irrigation district and its officers from proceeding further with the approval action and from carrying out the provisions of the proposed contract and from levying any assessments against the lands of the plaintiffs until the plaintiffs and the other landowners have the opportunity to vote on the proposed contract and further seeking a declaratory judgment decreeing that the 1951 statute is unconstitutional and in violation of the constitutional rights of the plaintiffs.

From the initial pleading the validity of the statute in question has been brought before the court and throughout the litigation at every stage of the proceedings the appellants here have contended that the statute violates their constitutional rights as impairing the obligation of a contract in violation of Article 1, Section 10, of the United States Constitution. Another issue involving the Constitution of the State of Kansas was pursued by appellants below which, of course, does not present a federal question and is not involved on this

appeal. But there is a valid federal question before the Supreme Court of the United States at this time; that question involves the obligation of contracts clause of Article 1, Section 10, of the Constitution. Questions as to the existence of a contract or as to whether or not a contract, if it exists, has been violated involve the merits of the case.

The appellees argue that the Kansas-Bostwick Irrigation District is a municipal corporation with only those powers that are given by the legislature and which powers may be increased, modified, or taken away by the legislature without the consent of any of the landowners or others interested in the district. The appellees fail to distinguish between purely governmental subdivisions created by legislative fiat to promote and carry out strictly governmental functions, and those types of corporations which are created by the voluntary action of certain individuals to carry out functions which are primarily for the benefit of those particular individuals and are only incidentally for a public purpose. An irrigation district is not a public municipal corporation; it is a quasi-public corporation engaged in activities of a private rather than of a governmental nature. The rule is well settled that even in the case of strictly municipal corporations, in determining whether a statute affecting such municipal corporation operates as an impairment of the obligation of a contract, regard must be had to the distinction between the rights of such a corporation in its public or governmental capacity and its private rights. See *Hunter v. Pittsburgh*, 207 U.S. 161, 52 L. Ed. 151, 28 S. Ct. 80; 12 Am. Jur. Constitutional Law Sec. 417; *Merchants National Bank v. Escondido Irrigation District*, 144 Cal. 329, 77 P. 937, 100 A.L.R. 174; *Duran v. Middle Rio Grande Conservancy District*, 46 N. M. 138, 123 P. 2d 389. It is true that neither the charter of a municipal corporation nor any legislative act regulating the use of property held by it for *governmental* or *public purposes* is a con-

tract within the meaning of the Federal Constitution. Yet municipalities have and exercise powers that are not strictly governmental in character. They may lawfully make contracts under which rights are acquired or liabilities incurred, and the legislature cannot legally pass any statute impairing rights thus acquired either by a municipal corporation or by persons dealing with it.

After an irrigation district is organized in Kansas the policies of the district are under the control of the landowners themselves since only the landowners are qualified to serve on the board of directors and only landowners have the right to take part in elections to select the board or for the approval of the issuance of bonds. It is true that irrigation districts are organized as quasi public corporations, but their function is to conduct a business for the private benefit of the landowners. They do not carry out governmental functions. See for example *Nampa v. Nampa & M. Irrig. Dist.* 1911, 19 Idaho 779, 115 Pac. 979, where the court declares:

> "An irrigation district is a public quasi corporation organized, however, to conduct a business for the private benefit of the owners of land within its limits. They are the members of the corporation, control its affairs, and alone are benefited by its operations. It is, in the administration of its business, the owner of its system in a proprietary rather than a public capacity, and must assume and bear the burdens of proprietary ownership."

It must be kept in mind that irrigation districts are not mere creatures of the state in the sense that they are created as governmental subdivisions to carry out governmental functions. Under the statutes of Kansas irrigation districts are created by the voluntary action of the landowners themselves. Kansas landowners are not compelled by the State of Kansas to adopt an irrigation program whether or not they desire to do so. The Kansas legislature simply makes it possible for

them to organize an irrigation district upon certain terms and conditions which are set forth in our statutes. The landowners can examine those statutes and determine whether or not those terms and conditions are acceptable. If a majority of the landowners desire to accept the terms and conditions offered by the legislature, they may contract among themselves to organize an irrigation district. The statute is one "ad invitum." The landowners have the option as to whether or not they desire to create a district. It is this situation which gives rise to a contractual relationship between the landowners the obligation of which must be protected from subsequent legislative enactments. The right to control the contracting powers of the board of directors of the irrigation district is, of course, a valuable property right. The right to vote on proposed contracts which may result in assessments against the lands in the district was the inducement which led the appellants and the other landowners in the district to enter into the organization of the district. It is this fundamental right which the appellees refuse to recognize. It is this quality which takes irrigation districts in Kansas out of the category of school districts, road districts and other purely governmental subdivisons. It should be noted that the trial court accepted the position of appellants and held the state statute in question unconstitutional as impairing the obligation of contract in violation of article 1, Section 10, of the Constitution of the United States.

This brief is not meant to be a comprehensive discussion of the questions involved on the merits of this appeal. It has been prepared for the sole purpose of showing to the court that the court has jurisdiction of this appeal and that substantial questions are involved.

We submit that the Motion of Appellees to Dismiss should be overruled.

Respectfully submitted,
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No. 752. MIZER ET AL. *v.* KANSAS-BOSTWICK IRRIGATION DISTRICT NO. 2 ET AL. Appeal from the Supreme Court of Kansas. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Martin B. Dickinson* for appellants. *A. B. Mitchell* for appellees. Reported below: 172 Kan. 157, 239 P. 2d 370.